


IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

 EDWARD SCHLECTER,

Petitioner,

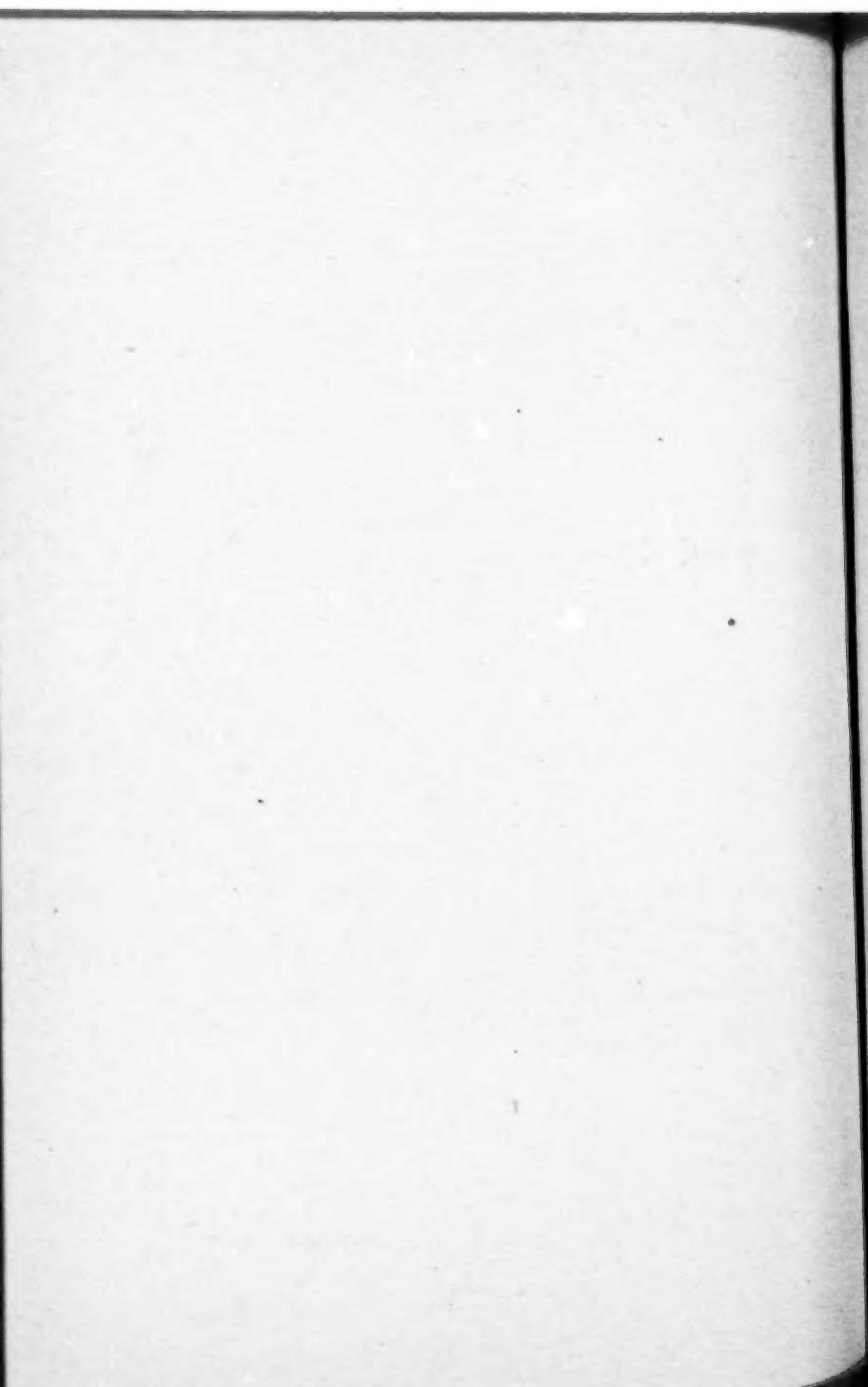
—against—

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn,
New York,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK, FOURTH
DEPARTMENT AND BRIEF IN
SUPPORT THEREOF**

AVEL B. SILVERMAN,
Attorney for Petitioner.



I N D E X

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
The Order Sought To Be Reviewed	2
Question Presented	2
Statement of Matters Involved and Relevant Statutes..	3
Rulings of the Court Below	5
Reasons for Allowing of Writ	5
BRIEF IN SUPPORT OF PETITION	9
Opinions Below	9
Jurisdiction	9
Statutes Involved	10
Statement of the Case	10
Argument	10
Conclusions	12

TABLE OF CASES CITED

	PAGE
Commonwealth v. Phillips, 11 Pick (28 Mass.) 28	11
Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917	11
People v. Coleman, 237 App. Div. 211	10
People v. Coleman, 264 N. Y. 536 affirming 240 App. Div. 947	10
People v. Gowasky, 244 N. Y. at page 460	12
People v. Heath, 237 App. Div. 211	10
People v. Heath, 264 N. Y. 536	10
Plumbly v. Commonwealth, 2 Mete. (43 Mass.) 413	11

OTHER AUTHORITIES CITED

Constitution of the United States	2
Penal Law of the State of New York:	
Section 408	3, 10
Section 1941	4, 10, 11
Section 1942	4, 10, 11
Section 1943	4, 10, 11
Report of the Joint Legislative Committee on the co- ordination of civil and criminal practice acts (Baumes Committee Report, N. Y. Legis. Doc. 1926, vol. 17, No. 84, p. 22)	11, 12
Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344)	9

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

*To the Honorable Chief Justice of the United States and the
Associate Justices of the Supreme Court of the United
States:*

Your petitioner, Edward Schlecter, respectfully prays for a writ of certiorari to the Appellate Division of the State of New York, Fourth Department, the highest Court of the State in which a decision could be had, to review a determination of that Court, rendered on the 14th day of March, 1945, affirming an order of the Supreme Court, Wayne County, New York, which order dismissed the writ of habeas corpus sued out by your petitioner against John F. Foster, Warden of Auburn Prison, at Auburn, New York, where your petitioner is now incarcerated.

The Order Sought To Be Reviewed

Your petitioner sued out a writ of habeas corpus, directed to the Warden of Auburn Prison (R. 7). He asserted in his petition for such writ of habeas corpus (R. 11) that by reason of the facts therein alleged, he was restrained in his liberty, in violation of his rights under the Constitution of the United States. That the imprisonment of your petitioner was in violation of such Constitutional rights, was also asserted, claimed and urged in the brief submitted in his behalf in the court of first instance, as well as in the Appellate courts. The court of first instance dismissed the said writ (R. 4, opinion R. 27). An appeal was prosecuted by the petitioner to the Appellate Division of the Supreme Court of the State of New York, Fourth Department, resulting in an order of affirmance, without opinion, on the 14th day of March, 1945. Application was thereupon made in the said Appellate Division, for leave to appeal to the Court of Appeals, and which application was denied by the said Court on the 1st day of May, 1945. Thereafter, application was made to the Court of Appeals for leave to appeal to the said Court. Said application was denied on the 7th day of June, 1945. Accordingly, the Appellate Division was the highest Court of the State of New York, in which a decision could be had.

The time for presentation of this application has been extended to October 7, 1945, by order of Mr. Justice Reed, dated August 29, 1945.

Question Presented

Where a previous conviction of the accused has been utilized by indictment to increase the offense charged and the punishment therefor, from that applicable to a mis-

demeanor, to that of a felony, can such previous conviction again be utilized after conviction upon such indictment, to enable the prosecuting authorities to increase the number of convictions of the accused, and thus sentence him to a maximum period of his natural life in prison; and is such procedure violative of the rights of the accused under the Fourteenth Amendment of the Constitution of the United States?

Statement of Matters Involved and Relevant Statutes

The petitioner was charged with the violation of Section 408 of the Penal Law of the State of New York, the substance of which is as follows:

"A person who * * * has in his possession * * * any instruments adapted, designed or commonly used for the commission of burglary * * * under circumstances evincing an intent to use or employ the same * * * in the commission of a crime * * * shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony * * *"

By reason of a previous conviction, the petitioner was indicted by the Grand Jury of Westchester County, New York, as for a felony (R. 16). The indictment charged a previous conviction, in December, 1923. Accordingly, pursuant to Section 408, the offense charged was increased from a misdemeanor to a felony.

Upon his conviction, the District Attorney filed an information (R. 23) under Section 1943 of the Penal Law, charging the petitioner with being a fourth offender.

Section 1943 provides: PROCEDURE RELATING TO RESENTENCING:

"If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has

previously been convicted of crimes as set forth either in section nineteen hundred and forty-one or nineteen hundred and forty-two, it shall be the duty of the district attorney * * * to file an information accusing the said person of such previous convictions * * * ”

Section 1942 provides: PUNISHMENT FOR FOURTH CONVICTION OF FELONY:

“A person who, after having been three times convicted * * * of felonies or attempts to commit felonies * * * commits a felony * * * shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for an indeterminate term * * * but in any event the term upon conviction for a felony as the fourth or subsequent offense, shall be not less than fifteen years, and the maximum thereof shall be his natural life.”

Section 1941 provides: PUNISHMENT FOR SECOND OR THIRD OFFENSE OF FELONY:

“A person, who having been once or twice convicted * * * of a felony * * * commits any felony within this state, is punishable upon conviction of such second or third offense, as follows:

* * * for an indeterminate term, the minimum of which shall be not less than one half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however that the minimum sentence imposed hereunder upon such second or third felony offender shall in no case be less than five years; except that where the maximum punishment for a second or third

felony offender hereunder is five years or less, the minimum sentence must be not less than two years
 . . . ”

In charging the petitioner with being a fourth offender, the District Attorney included in the three previous offenses charged, the same conviction (in December, 1923) as had been previously utilized in the indictment to increase the offense charged from a misdemeanor to a felony (R. 24). Had such offense been omitted from those enumerated in the information, the petitioner would have been subject to the penalties of a third offender under Section 1941.

Upon filing the information, the petitioner was sentenced to a minimum term of fifteen years, and a maximum term of his natural life (R. 14).

Rulings of the Court Below

The Court of first instance, while inclined to adopt the view of the petitioner (R. 28), felt bound by the decision of the Court of Appeals in *People v. Heath* and *People v. Coleman*, 264 N. Y. 536, affirming without opinion, 237 App. Div. 209 and 211 (R. 28 and 29). The Appellate Division of the Supreme Court, Fourth Department, in affirming the order, rendered no opinion. The Court of Appeals, in declining to grant leave to appeal, likewise rendered no opinion.

Reasons for Allowing of Writ

1—For his commission of an offense under Section 408 of the Penal Law, normally a misdemeanor, the petitioner, by reason of a prior conviction, is required to be subjected to an increased punishment as for a felony. Upon conviction, the District Attorney files information, whereby he once again seeks to add to the punishment of the accused, by charging him as a fourth offender, predicated upon the same prior conviction. We contend that such prior conviction

tion, having been used to increase the punishment from a misdemeanor to a felony, has spent its force; it cannot again be used to still further increase the punishment, as in the present case, to a maximum term of the prisoner's life. In December, 1923, upon such prior conviction, the prisoner is sentenced to State's prison for three years (R. 24). In 1940, by reason of such prior conviction, an offense committed by the petitioner is subject to indictment (R. 16) (which would otherwise be a misdemeanor) and he is rendered amenable to increased punishment, predicated upon such prior conviction. Upon being convicted upon such indictment, the prisoner is once again, and for the third time, required to submit to further increased punishment for the offense committed in 1923. The procedure thus adopted is violative of the due process of law required by the Constitution.

2—The procedure for filing an information, after conviction for an offense, charging prior convictions, has been adopted and recognized as a substitute for charging prior convictions in the indictment. It has been so recognized by this Court, at the time the constitutionality of the laws providing for increased punishment to prior offenders was the subject of consideration. That it is an alternative remedy, and not a cumulative one, has been recognized by the Courts of Massachusetts, and indeed by the Court of Appeals of New York. To accumulate the increased punishments for the same offense, first by way of indictment and then by information after conviction, is contrary to due process of law, and inconsistent with the rulings of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme

Court of the State of New York, Fourth Department, commanding the said Court to certify and send to this Court, a full and complete transcript of the record of all proceedings of the said Court, had in this cause, to the end that the said cause may be reviewed and determined by this Court.

Dated, New York, August 2nd, 1945.

AVEL B. SILVERMAN,
Attorney for Petitioner.

JAY A. GILMAN,
Of Counsel.